United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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76-7261

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United States Court of Appeals
For the Second Circuit

LILLIAN V. CANNON, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

-against-

THE UNITED CHURCH BOARD FOR HOMELAND MINISTRIES, and REV. OTIS YOUNG, REV. SERGE HUMMON, REV. HOWARD SPRAGE, and MR. WILLIAM NELSON, individually and as Officers of UNITED CHURCH BOARD FOR HOMELAND MINISTRIES,

Defendants-Appellees.

APPELLANTS' BRIEF

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APPELLANTS' BRIEF

INTRODUCTORY STATEMENT

Plaintiff, Lillian Cannon, instituted this action, in the Southern District of New York, on behalf of herself and other persons similarly situated, seeking redress for unlawful discriminatory employment practices, pursuant to the provisions of 42 U.S.C. 2000 e (popularly known as Title VII of the Civil Rights Act.). Plaintiff seeks reinstatement to employment, with back pay, attorneys fees, and other appropriate money damages.

Defendants moved to dismiss, alleging that plaintiff had failed to comply with 42 U.S.C. 2000 e 5(e), requiring that a charge must be filed with the Equal Employment Opportunity

Commission (hereinafter referred to as the E.E.O.C.) within 300 days after the occurrence of the discriminatory act or acts complained of.

The District Court, by the Hon. Lee P. Gagliardi, granted defendants' motion to dismiss, by order dated April 27, 1976. This appeal is from the District Court's order of dismissal.

STATEMENT OF FACTS

Plaintiff, Lillian Cannon, is a member of the black race. She was employed by defendants, as an executive secretary, until her employment was terminated by defendants on December 31, 1971.

In January, 1972, plaintiff filed a complaint with the New York City Commission on Human Rights, alleging the existence of racially discriminatory practices during her employment, and alleging that her employment had been terminated, both because of her race and in retaliation for previous complaints she had made to defendants regarding discriminatory practices. (It is not necessary to examine the merits of plaintiff's complaint on this appeal, since this appeal deals solely with statute of limitations questions.)

The City Commission on Human Rights found no probable cause, in September, 1972; and ultimately dismissed plaintiff's complaint, after an appeal, in October, 1973.

In January, 1973, plaintiff filed a complaint with the E.E.O.C.

The E.E.O.C. delayed action on plaintiff's complaint until June 23, 1975, at which time it dismissed said complaint as being untimely, in that it had not been filed within 300 days of plaintiff's termination from employment. Subsequently on July 15, 1975, the E.E.O.C. sent plaintiff a notice of "Right to Sue", informing plaintiff of her right to institute suit in District Court within 90 days of her receipt of said letter.

Plaintiff instituted the instant action in the United States District Court for the Southern District of New York, on October 10, 1975.

QUESTIONS PRESENTED

1. Was plaintiff's filing of a complaint with the E.E.O.C. timely?

2. Was plaintiff's suit in the United States District Court timely?

3. Were plaintiff's class action allegations sufficient to state a cause of action regarding continuing violations against other members of the class?

POINT I

PLAINTIFF'S PROMPT FILING OF A COMPLAINT WITH THE NEW YORK CITY COMMISSION ON HUMAN RIGHTS, AND HER LATER FILING WITH THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, CONSTITUTED SUBSTANTIAL COMPLIANCE WITH THE STATUTE OF LIMITATIONS. IN THE ALTERNATIVE, PLAINTIFF'S ACTIONS WERE SUFFICIENT TO TOLL THE STATUTE, AND THE FILING OF PLAINTIFF'S COMPLAINT WITH THE E.E.O.C. WAS TIMELY.

42 U.S.C. 2000 E-5 provides that a charge must be filed with the E.E.O.C. within 300 days of the alleged unlawful

discriminatory practice in states, such as New York, which have state or local anti-discrimination agencies.

This statute, by requiring a plaintiff to first proceed before the E.E.O.C., prior to suit in federal District Court, is in effect, a legislative enactment of the well known principle requiring exhaustion of administrative remedies, and has so been described by the courts. See Gibson v. Kroger Co. 506 F. 2d 647 (1974). Since the doctrine of exhaustion of administrative remedies is an equitable doctrine, the courts have traditionally applied said doctrine with flexibility, rather than with rigid adherence to statutory time limitations.

Title VII of the Civil Rights Act has been held to manifest a strong public policy in favor of a liberal construction of the statute, including a liberal construction of statutes of limitations, in order to ensure that aggrieved plaintiffs, who are usually unrepresented by counsel, (at least at the early stages of the proceeding), will not be denied their day in court.

The Second Circuit has adhered to this liberal interpretation of the statute, in the recent case of Egelston v. State University, Docket No. 76-7047, June 7, 1976. As this court stated, at page 4029 of the slip opinion:

> "There is an additional factor equally vital to the resolution of this case. Title VII is rife with procedural requirements which are sufficiently labyrinthe to baffle the most experienced lawyer, yet its enforcement

mechanisms are usually triggered by laymen. Were we to interpret the statute's procedural requirements stringently, the ultimate result would be to shield illegal discrimination from the reach of the Act. Prior decisions, both of the Supreme Court and of this circuit have, for this reason, taken a flexible stance in interpreting Title VII's procedural provisions. We follow this realistic approach today."

In the instant case, plaintiff never retained any counsel until September 24, 1975, and was unrepresented by counsel at the times when the statute of limitations' problems arose.

In Huston v. General Motors, Corp., 477 F 2d 1003 (1973); and Moshos v. Dist. Council of N.Y., Local 1456, (SDNY) 385 F Supp 21 (1974), plaintiffs were issued right to sue letters by the E.E.O.C. They failed to institute suit in federal court within ninety (90) days; however, they did file their right to sue letters in federal district court, along with requests for the appointment of counsel.

Plaintiffs had technically failed to comply with the statute of limitations.

However, the courts held that the statute should be tolled until a reasonable time after the appointment of counsel; applying the rule that Title VII should be liberally construed, to protect non-lawyer plaintiffs who were unrepresented by counsel.

In Franks v. Bowman, 498 F 2d 398 (1974), the E.E.O.C.'s first "right to sue" letter was opened by plaintiff's nine year old nephew, who lost it, without the plaintiff ever seeing it.

Since the letter had been delivered to plaintiff's residence, the E.E.O.C. had complied with the statute, and the failure to sue within ninety (90) days constituted a technical violation of the Statute of Limitations.

However, the court applied equitable principles to toll the statute until after the receipt, by plaintiff, a year later, of a second right to sue letter from the E.E.O.C.

The above cases apply to the period of time limitation for the commencement of an action in federal district court, after the E.E.O.C. has completed action on a complaint.

The principle of tolling of the statute of limitations, for equitable reason applies with even more force, to the time limitation for filing with the E.E.O.C. (now three-hundred (300) days).

In Culpepper v. Reynolds Metals Co., 421 F. 2d 888 (1970); an employee failed to file with the E.E.O.C. within the statutory time period, because he had participated in a labor-management grievance procedure, established by the collective bargaining agreement under which he had been employed.

The Fifth Circuit held that the employee should not be penalized for exercising his union grievance procedures, prior to filing with the E.E.O.C., and that the law should not discourage other attempts to resolve grievances or controversies. As the court stated, at page 892:

" 'Statutes of LImitations are primarily designed to assure fairness to defendants. Such statutes promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded'. Burnett v. New York Central Rail Road Co., supra, 380 U.S. at 428, 85 S. Ct. at 1054. Congress, in placing the various time limitations in Title VII, was attempting to eliminate the problem of 'second thought complaints', stale complaints and the hampering effect they can have on our labor market. However, the time limitation is meant to penalize only those who sleep on their rights and remedies, not one who actively attempts to settle his complaint by following the 'rules of the shop'. Moreover, 'the policy behind statutes of limitations is outweighed when the interests of justice require vindication of the plaintiff rights.' Burnett v. New York Central R.R., supra, at 428, 85 S. Ct. at 1055, This is the only consistent reading of a 'humane and remedial act'. Burnett v. New York Central R.R. Co., supra, at 427, 85 S. Ct. 1050.

Similarly, in Hutchings v. United States Industries, 428 F 2d 303 (1970), the Fifth Circuit stated that the statute of limitations for filing with the E.E.O.C. would be tolled.

"Once an employee invokes his administrative remedies in a constructive effort to seek a private settlement of his complaint."

As the same court stated in Reeb v. Economic Opportunity Atlanta, Inc., 516 F 2d 924 (1975), equitable modification of the statute of limitations is justified, on certain occasions, because of the:

"Great emphasis in Title VII on private settlement and the elimination of unfair practices without litigation." (p. 927)

The above principle, i.e. that the statute of limitations for filing with the E.E.O.C. is tolled by the plaintiff's

resort to labor arbitration, has also been applied by numerous other circuit courts. See Sanchez v. Trans World Airlines, 499 F 2d 1107, (1974) (10th Cir.); Malone v. North American Rockwell Corp., 457 F 2d 779 (1972) (9th Cir.); Phillips v. Columbia Gas, 347 F. Supp. 533; Affd. without opinion, 474 F 2d 1342 (4th Cir.).

I have found no cases opposed to the above principle.

In the instant case, plaintiff's delay in filing with the E.E.O.C. was not caused by resort to a labor arbitration or union grievance procedure, but by resort to the remedies and procedures of the New York City Commission on Human Rights.

If the labor arbitration or grievance procedures serve to toll the statute of limitations; the reasons for tolling the statute of limitations in the instant case are even more compelling.

A labor arbitration may often deal with separate and distinct issue, not involving racial discrimination. It is entirely separate from a civil rights action, and the Supreme Court has held that an employee who has lost a labor arbitration may still litigate discrimination issues in a subsequent civil rights action. Alexander v. Gardner-Denver, 415 U.S. 36 (1974).

A labor arbitration or union grievance procedure may be conducted simultaneously with an E.E.O.C. proceeding; there is nothing to prevent the two proceedings from being processed at the same time. Yet despite that fact, the above

cited courts have held that the statute of limitations for filing with the E.E.O.C. is tolled, while the employee resorts to collective bargaining grievance procedures.

By contrast, the E.E.O.C. can not and will not act on a complaint, while it is pending at a state or city anti-discrimination agency, 42 U.S.C. 2000 E-5, subd. d, provides that the E.E.O.C. shall refer all complaints to an appropriate state or local agency, in states which have anti-discrimination laws. Similarly, the federal regulation, 29 C.F.R. 1601.12, requires the E.E.O.C. to defer to state or local agencies.

In the instant case, plaintiff was terminated from her employment with defendant on December 31, 1971, and filed a complaint with the City Commission on January 21, 1972, only twenty-one (21) days later. The City Commission did not finally dispose of her case until October 2, 1973, when it rejected plaintiff's appeal from a determination of no probable cause. Thus, plaintiff's filing of her complaint with the E.E.O.C., on January 3, 1973, was actually prior to the completion of proceedings at the City Commission.

It is illustrative to note the procedures which would have been followed if plaintiff had filed immediately with the E.E.O.C., as defendants suggest she should have done. The E.E.O.C. would not have processed the case, but would have referred it to the City Commission, or to the State Division of Human Rights. The E.E.O.C. would then defer consideration of the case until the local agency completed

processing, and reached its determination.

Thus, had plaintiff filed immediately with the E.E.O.C., the result would have been the same. The case would have been deferred to the City, or state, and not processed by the E.E.O.C. until a later date. The pre-filing with the E.E.O.C. would have been a meaningless charade.

To paraphrase the quotations from Burnett v. New York Central R.R., supra; and Culpepper v. Reynolds Metals Co., supra; plaintiff has not slept on her rights, defendant was informed of plaintiff's claim only twenty-one (21) days after it arose, plaintiff has actively attempted to resolve her complaint, and the statutes of limitations should be tolled.

In Love v. Pullman, 404 U.S. 522 (1972), the Supreme Court stated that a purpose of Title VII was:

> "To give state agencies a prior opportunity to consider discrimination complaints" (p. 526).

The court stated, in a slightly different context than the instant case (at page 528):

> "To require a second filing by the aggrieved party after termination of state proceedings would serve no purpose other than the creation of an additional procedural technicality. Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process."

In the instant case, defendant seeks to impose upon plaintiff the additional procedural technicality of first filing with the E.E.O.C., so that the E.E.O.C. could then refer

the case to the City Commission; a procedural technicality which would have served no useful purpose.

The principle that a filing with a state agency or state court should serve to toll the federal statute of limitations, was set forth by the Supreme Court in Burnett v. New York Central Railroad, 380 U.S. 424 (1965).

Burnett instituted an action in an Ohio state court, under the Federal Employer's Liability Act. The action was dismissed for improper venue. Later, he instituted suit in Federal District Court, however, by that time, the statute of limitations on the federal claim had run.

The Supreme Court held that the instituting of the action in state court tolled the federal statute of limitations. The court pointed out that the defendant was not prejudiced, since the state court action had served to make it aware of Burnett's claim.

In those cases where statutes of limitations have been invoked against plaintiffs, the plaintiffs in question had slept on their rights and did nothing, until after the expiration of the statutory period of limitation. For example, in Olson v. Rembrandt Printing Co., 511 F 2d 1228, the claimant filed no charges with either the E.E.O.C. or with a state or local anti-discrimination agency, for more than 180 days after the alleged discriminatory acts.

The District Court attempts to distinguish the numerous cases where a labor arbitration has been held to toll

the statute of limitations; by stating that a tolling of the statute in the instant case "would be to ignore the clear language of the statute". (District Court Opinion, page 5).

However, it could equally be said that the language of the statute is clear, as regards arbitration. The statutory language of 42 U.S.C. 2000 e-5(e) very definitively sets forth a 180 day requirement for filing a complaint with the E.E.O.C., in those situations where there has not been a complaint filed with a state or local agency. There can be no doubt whatsoever that the statute creates no exception for arbitration; i.e. that in cases of arbitration, the aggrieved party is still required to file with the E.E.O.C. within 180 days of the discriminatory act.

Yet the courts have created an exception, i.e. they have provided an equitable remedy by holding that the statute is tolled in these instances.

The answer is that if the statute of limitations did not apply, on its face, it would not be necessary to toll the statute. In cases where the statutory language is not applicable, or is not clear, a court will usually so hold. The procedural devise of tolling a statute only comes into play as an equitable remedy after there has been a lack of compliance with the statute. This can be seen in the numerous cases cited in this section of this brief, and also under Point II of this brief, where federal courts have tolled statutes of limitations, in the interests of justice, despite

clear non compliance with the statutory time limits.

Statutes of limitations generally have two purposes; to protect a potential defendant by enabling him to be promptly informed of charges against him; and to provide that claims will be litigated within a certain time period, before they become stale and before excessive delays create hardship for the defense.

As stated earlier, plaintiff's technical failure of compliance did not prejudice defendants one iota. Defendants learned of the charges 21 days after the alleged discriminatory acts, when plaintiff filed with the City Commission. And since the E.E.O.C., in any event, would not have processed the case until after the City Commission had completed its action, the procedure followed by plaintiff did not delay the disposition of this case.

In the instant case, plaintiff has suffered prejudice for another reason. Plaintiff could have instituted a civil rights action against defendants under 42 U.S.C. 1981, going directly into federal court without resort to the administrative remedy of the E.E.O.C. However, the statute of limitations, in New York, on Sect. 1981 actions has been held to be three (3) years. Romer v. Leary, 425 F 2d 186 (2d Cir.) (1970); Kaiser v. Cahn, 510 F 2d 282, (2d Cir) (1974).

In the instant case, the E.E.O.C. sat on plaintiff's case for two and a half years without taking any action before dismissing the complaint as untimely. By the time said complaint

was dismissed, on June 23, 1975, the three (3) year statute of limitations for Sect. 1981 actions had run. Plaintiff could not have reasonably expected the E.E.O.C. to refuse to process her case on the merits, after the E.E.O.C. had held her case for two and a half years. She relied upon the E.E.O.C., to her detriment.

In Guerra v. Manchester Terminal Corporation, 498 F 2d 641, (1974), the Fifth (5th) Circuit held that a prospective plaintiff may be adversely prejudiced because of his reliance upon the E.E.O.C.

POINT II

PLAINTIFF'S INSTITUTION OF A CIVIL ACTION IN THE UNITED STATES DISTRICT COURT, WITHIN 90 DAYS OF A RIGHT TO SUE LETTER, WAS TIMELY

Defendants' motion to dismiss was based on only one ground; i.e. the question of whether plaintiff's complaint should be dismissed for noncompliance with the 300 day period of limitations for filing with the E.E.O.C., (discussed in Point I, above.)

However, the District Court, on page 7 of its opinion, invoked an additional ground, an alleged lack of compliance with 42 U.S.C. 2000 e-5(f); i.e. an alleged failure by plaintiff to institute suit in the District Court within 90 days after notification by the E.E.O.C. that her charges had been dismissed.

In the first place, this issue was not properly

before the court. Statutes of limitations are affirmative defenses, which may be waived. Inasmuch as the defense did not choose to invoke this particularly statutory provision, it was improper for the district court to consider this affirmative defense.

However, even if the issue had been properly raised, it must fall on the merits. The facts are as follows: On June 23, 1975, the E.E.O.C. sent plaintiff a letter informing her of the dismissal of her complaint. In said letter, the E.E.O.C. stated that if she wished to sue in the U.S. District Court "please use the enclosed envelope to send us a letter requesting a Notice of Right To Sue in your case..."

Thus the clear import of the June 23 letter was to inform the plaintiff that before she could institute suit in the District Court, she must send a further letter to the E.E.O.C. and obtain, by return mail, a Notice of Right to Sue as a prerequisite to the commencement of suit.

Plaintiff responded to the June 23 letter with an appropriate request, and subsequently received a Notice of Right To Sue, dated July 15, 1975. The Notice did not inform her, as it might have, that her 90 day period to institute suit ran from June 23, 1976. Instead, the Notice specifically informed her to 90 day period of limitations started to run upon receipt of the July 15 notice.

Having been informed by the government agency with

expertise in the area that she had until mid-October to institute suit, plaintiff waited until Sept. 24, 1976, at which time she retained counsel, thus giving counsel three weeks to prepare a complaint, which cannot be criticized as unreasonable. Accordingly, the summons and complaint were filed in the United States District Court on October 10, 1976.

In the first place, it is well settled law that an agency's interpretation of the statutes under which it operates carries great weight, in view of the agency's expertise in the particular area of law.

However, even assuming arguendo that the E.E.O.C. was wrong, (and this court has suggested as much in DeMatteis v. Eastman Kodak, 511 F. 2d 306); several courts have held that a plaintiff who is misled by erroneous advice from the E.E.O.C. will not be barred on statute of limitations grounds which arose because plaintiff followed this erroneous advice.

Taylor v. Pacific Intermountain Express Co., 394 F Supp 1972, N.D., Ill., (1975), closely parallels the instant case. In Taylor, as in the instant case, the E.E.O.C. in its original letter advised the complainant that a Right To Sue Notice was necessary. Subsequently, the E.E.O.C. sent the complainant a Right To Sue Notice advising the complainant that there were still 90 days to file suit.

The Court was highly critical of the E.E.O.C.'s procedure, as misinforming potential plaintiffs. Accordingly,

the cour held that plaintiff's suit in district court was not time-barred.

In Gates v. Georgia Pacific, 492 F 2d 292 (1974), the E.E.O.C. sent complainant a letter informing him that the case had been closed, but failed to advise him of the time limit governing the commencement of a court action. Thus, in Gates, there had been a mere nonfeasance by the E.E.O.C., as contrasted with the active misfeasance, i.e. the active erroneous advice which was given in Taylor and in the instant case.

Still, the 9th Circuit, in Gates, held that the statute of limitations would be tolled, because of the failure of the E.E.O.C. to give proper advice.

In Austin v. Reynolds Metal Co., 327 F. Supp. 1145 (E.D. Va., (1970), a notice from the E.E.O.C. informed the complainants that in order to institute suit they may take said letter to the Clerk of the Court and request that a federal judge appoint an attorney for them, and that this must be done within 30 days. (The statute has subsequently been amended to 90 days). This of course was erroneous; the statute requires the complainant to file suit within the time period, and not merely deliver a letter to a court clerk.

However, based upon the above erroneous advice, the court refused to apply the statute of limitations.

For similar cases, see Huston v. General Motors Corp.,

477 F 2d 1003 (1973); and Moshos v. Dist. Council of N.Y. Local 1456, 386 F . Supp. 21 (1974).

If DeMatteis v. Eastman Kodak, 511 F. 2d 306 (2nd Cir., 1975), appears to point in a different direction from every other case which has considered this question; it should be pointed out that the facts in DeMatteis were clearly distinguishable from the instant case. In DeMatteis, the complainant was represented by counsel during the critical 90 day period; perhaps DeMatteis stands for the principle that in this age of Watergate, an attorney should know better than to trust a government agency.

By contrast, in the instant case, plaintiff was unrepresented by counsel during the critical time period. Certainly plaintiff, as a layman, was entitled to rely upon the time limits set forth by the E.E.O.C. While the Second Circuit has held, in DeMatteis, that plaintiff could have instituted suit at any time after June 23, 1976, without waiting for a Right to Sue Notice, plaintiff was not aware of this, and in fact was advised to the contrary by the E.E.O.C.

If the courts were to tell the average citizen that he can not rely upon interpretations of law handed down by duly constituted government agencies, chaos and anarchy would result. Would one wish to see the average citizen defy the commands of a police officer until he has the opportunity to

check said directives in a law library? In the interests of a stable society, it is essential that a citizen who accepts the legal directives or instructions of a government agency not be compelled to do so at his peril.

De Matteis is distinguishable from the instant case in another crucial respect. In DeMatteis, it does not appear from the court's opinion that the E.E.O.C. actively misadvised the prospective plaintiff in its original letter closing the case. However, in the instant case, the clear import of the June 23 letter to plaintiff was that plaintiff must obtain a right to sue notice before commencing a court action. Also, the June 23 letter contained no 90 day time limitations, whereas the subsequent July 15 notice did contain a 90 day notice, running from July 15.

POINT III

THE INSTANT ACTION SHOULD NOT BE DISMISSED ON STATUTE OF LIMITATIONS GROUNDS, AS PLAINTIFF HAS ALLEGED THAT THERE ARE CONTINUING VIOLATIONS AGAINST OTHER MEMBERS OF THE CLASS OF PLAINTIFFS

Plaintiff has alleged that the racially discriminatory acts complained of were continuing violations, which continued after the termination of her employment.

As this court stated in Egelston v. State University, supra at page 4029 of the slip opinion:

> "Dismissal of a complaint . . . before any discovery has taken place or an answer filed . . . is even more drastic. It is a devise that must not be

employed unless, taking as true the allegations pleaded, it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." (citations omitted).

In the instant case, there is no doubt that the proof of discriminatory acts subsequent to plaintiff's termination of employment would be more difficult; it is always difficult in employment cases to obtain testimony from employees who may still be on the job, with fears of retaliation. However, potential difficulty of proof is not a ground for dismissal before trial.

It is well settled law that complaints against continuing acts of discrimination are not cut off by statutes of limitations. Marlow v. Fisher Body, 489 F 2d 1057 (1973); Laffey v. Northwest Airlines, 366 F. Supp. 763 (1973); Ostapowicz v. Johnson Bronze Co., 369 F. Supp. 522 (1973). See also, E.E.O.C. v. Western Pub Co., 502 F 2d 599, holding that where there are non-frivolous allegations of continuing violations, the statute of limitations may not be raised.

In Kohn v. Royall, Koegel and Wells, 59 F.R.D. 515, (SDNY), appeal dismissed, 496 F 2d 1094, Judge Lasker held that where the individual plaintiff alleged continuing violations against the class, the statute of limitations did not apply. Accordingly, the court found it unnecessary to reach the tolling issue discussed in the instant case; in fact,

a reading of the court's opinion does not indicate whether the question of a tolling of the statute of limitations was ever raised in Kohn.

As the court stated, on page 519 of the Kohn opinion (footnote 6):

> "Once the judicial machinery has been set in train, the proceeding takes on a public character in which remedies are devised to vindicate the policies of the Act, not merely to afford private relief to the employer."

CONCLUSION

In view of the above, the order of the District Court which dismissed this action should be reversed, and the case should be remanded for trial on the merits.

Respectfully submitted,

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STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 23 day of August 197 6 deponent served the within Brief upon:

Manning, Carey & Redmond, Esqs.

attorney(s) for

Appellee

in this action, at

122 East 42nd St. NYC

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey

Sworn to before me, this 23
day of August 197 6

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1977